BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN RE: COMPLAINT AND PETITION FOR RELIEF OF BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T SOUTHEAST d/b/a AT&T SOUTH CAROLINA v. HALO WIRELESS, INCORPORATED FOR BREACH OF THE PARTIES' INTERCONNECTION AGREEMENT	§	DOCKET NO. 2011-304-C

HALO WIRELESS, INC.'S POST-HEARING BRIEF

NOW COMES Halo Wireless, Inc. ("Halo") and files its Post-Hearing Brief as follows:

I. INTRODUCTION.

Bellsouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T") has failed to meet its burden of proof for establishing any right or grounds for the relief requested in its Complaint and Petition for Relief (the "Complaint").[1] The testimony and evidence entered into the record in this matter establish that pursuant to its Radio Service Authorization ("RSA") issued by the Federal Communications Commission ("FCC"), Halo is providing commercial mobile radio service ("CMRS")-based telephone exchange service (as defined in the Communications Act of 1934, as amended by the Communications Act of 1996 (the "Act"), 47 U.S.C. § 153(54)).[2] Because Halo operates pursuant to its RSA from the FCC

[1] Although Halo's Motion to Dismiss asserting the jurisdictional deficiencies of this proceeding were originally denied, Halo also maintains that the testimony and evidence elicited in this investigation support denying the relief requested by AT&T on the grounds that the relief requested is beyond the scope of this investigation or the Commission's jurisdiction to decide.

[2] The Act was recently updated and the subsection references in section 153 were changed. This Brief uses the new section numbering.

and section 332(c)(3) of the Act expressly preempts state regulation of CMRS entry or rates, the Commission does not have authority to interpret this license or require that Halo have a certificate from South Carolina to operate.

Halo provides its services to its high volume end user customer, Transcom Enhanced Services, Inc. ("Transcom"), based on a business model ultimately directed at expanding its network to offer its services to retail end user customers. Transcom is an enhanced service provider ("ESP") providing "enhanced service," as that term is defined in 47 C.F.R. § 64.702(a) and "information service," as that term is defined in section 153(24) of the Act, and has been ruled to be an ESP on several occasions by federal courts of competent jurisdiction. As a result, Transcom's services are not "telecommunications," as defined in the Act, and are not subject to access charges.

For purposes of the ICA "whereas" clause, all of the communications at issue originate from end user wireless customer premises equipment ("CPE"), as defined in section 153(16) of the Act, and none of the traffic is subject to exchange access under either the old FCC rules or the new rules. It was "non-access" before the new rules and it is still "non-access" under the new rules. AT&T has failed to meet its burden of proving that any of the traffic at issue is associated with a telephone toll service provided by or to Halo or Transcom or that any of the traffic at issue is subject to any ILEC switched access tariff. As a result, AT&T has not demonstrated that the traffic at issue is "exchange access" or that there is any "access" traffic that is being disguised by either Halo or Transcom. To the contrary, Halo's handling of the traffic at issue, including its signaling practice to indicate that Transcom is the financially responsible party, was and is appropriate and consistent with industry standards.

Ultimately, the testimony and evidence demonstrate that Halo has not breached its ICA with AT&T and that Halo does not owe any "access" or other charges to AT&T. Halo has paid all charges due to AT&T required under the ICA, including facilities charges. Accordingly, the relief requested by AT&T should be denied.

II. LAW AND ARGUMENT.

A. Halo was and is paying appropriate compensation for the traffic being delivered to AT&T for termination in South Carolina.

The testimony and evidence establish, consistent with the terms of its ICA with AT&T, that Halo has paid AT&T reciprocal compensation for all traffic that AT&T has terminated in South Carolina and that Halo has also paid AT&T for all facilities charges and transit functions it provides. AT&T merely asserts that it should be paid more based on its view that Halo's traffic is not what Halo says it is.

AT&T continues to refer to the communications as "interexchange" as the basis for their assertion that access applies, but that is not the test. For example, before Transcom can be said to be providing telephone toll service there must be a previous finding that Transcom is a common carrier. AT&T did not present any persuasive evidence that Transcom has held out as a common carrier or can be compelled on a retroactive basis to be a common carrier. Similarly, there is no evidence that Halo (which is a common carrier) has provided any service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

As set forth more fully below, AT&T has utterly failed to meet their burden of showing that, even if "exchange access" can be lawfully applied, their switched access tariffs actually govern. AT&T has a heavy burden: it must demonstrate (1) that it is in

fact providing "switched access," as it is defined in the tariffs; (2) that Halo falls within the definition of "Customer" in its tariffs; (3) and that they are providing switched access as defined and described in the tariff, including the specific and detailed technical specifications of a particular switched access "Feature Group."

To date, AT&T's proof constitutes mere vigorous and repeated assertions that access applies without saying what specific service is involved or how. *See e.g.* Transcript pp. 99:7-102:7. The law requires far more. Any finding that the tariff applies must be supported by detailed and specific references to which individual tariff sections lead to the conclusion that Halo is the ILEC's "Customer" of a discrete and particular switched access feature group arrangement. The technical descriptions associated with a specific feature group must be matched with the technical details of the interconnection arrangement in the LATA. *See e.g.* Transcript pp. 125:25-128:16. General allegations and unsupported conclusions are wholly insufficient, but that is all AT&T has presented.

The traffic in issue is "non-access traffic" as a matter of law. The FCC defined "non-access traffic" in *T-Mobile* note 6 as "traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to section 251(b)(5) of the Act and ISP-bound traffic."[3] The wireless CPE being used by Halo's end user customers is IP-based. The traffic originates and/or terminates in IP format because it originates from and/or terminates to an end user customer of a service that requires Internet protocol-compatible CPE. The traffic is still "non-access" under new section 51.701(b)(3). Therefore, on and after December 29, 2011, AT&T has the burden of proving that the traffic in issue is "toll

[3] Declaratory Ruling and Report and Order, *In the Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket 01-92, FCC 05-42, 20 FCC Rcd 4855 (2005) ("*T-Mobile*").

VoIP-PSTN" before any payment can be required, and even then it would only be chargeable at the interstate rate.

In any event, and despite all the protestations of the ILECs, the traffic is still non-access" under the FCC's specific holding that Halo's traffic is a form of "transit" in ¶ 1006 and the FCC defined "transit" as "non-access" in ¶ 1311. Rule 20.11(d) prohibits LECs from imposing any tariff charges on non-access traffic. Thus, AT&T's contentions fail as a matter of law.

AT&T prefers to assume that Transcom is a carrier and that access charges are owed on the traffic. However, Transcom has obtained four federal court decisions (the "ESP rulings") that directly construed and then decided Transcom's regulatory classification and specifically held that Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the public switched telephone network ("PSTN"); and (5) may instead purchase telephone exchange service just like any other end user. True and correct copies of the ESP rulings were filed into the record as Exhibits 1-4 of the Johnson Direct Testimony. Transcom and Halo have the right to rely on Transcom's ESP rulings, but AT&T refuses to acknowledge that right. As set forth more fully below, although Halo and Transcom have demonstrated the above valid basis for the compensation arrangement that exists between the parties. AT&T has failed to meet its burden of proving the legal and factual basis for any other compensation arrangement.

B. Halo's practices do not conflict with the terms of its ICA with AT&T.

Halo's "actions" are fully consistent with the ICA terms and AT&T has failed to meet its burden of proving any breach. Notably, the only breaches alleged are improper call signaling and sending traffic that is claimed to not be "wireless-originated." As discussed more fully below, AT&T has failed to meet its burden of proving that Halo is taking any action to "disguise" anything with regard to signaling. Accordingly, AT&T cannot meet its burden of showing a breach of the signaling provisions of the ICA.

Any allegation of breach for allegedly sending traffic that does not originate from a Halo customer's wireless CPE is purely based upon AT&T's misinterpretation of the law, including a complete disregard of the rulings finding that Transcom is an ESP or at least an end user. Indeed, these allegations are based wholly on the assertion that the traffic in question began elsewhere on the PSTN (even though they *admit* they have no way to know that a call started on the PSTN based solely on the CPN content). *See e.g.* Transcript pp. 238:20-242:23. In other words, the allegation of breach assumes that Transcom is a carrier, not an end user, and even if Transcom is not an ESP, it is still an end user because it is not a common carrier. End users are "end points" and cannot be a mere "intermediate switching point" where no origination occurs. AT&T has failed to meet their burden of proof, and their claims fail as a matter of law.

1. The traffic at issue is wireless originated, non-access traffic.

Although AT&T bears the burden of proof on showing what they claim Halo's traffic is and what compensation applies, they have completely failed to do so. In fact, on the question of whether the traffic in question qualifies as "wireless" or "CMRS" for compensation purposes, AT&T has admitted that it has no real way of accurately

identifying whether a particular call actually "originated" from a "wireline" customer of an LEC using a traditional phone.[4] *See e.g.* Transcript pp. 238:20-242:23; *see also* Direct Testimony of Russ Wiseman, p. 4.

Instead, the entirety of AT&T's case is based on a review of the calling number in the CPN parameter, identifying the rate center the number is associated with and the type of number ("wireline" or "wireless"), and then the specific company that has the individual number. *See e.g.* Transcript pp. 238:20-242:23. They then *assume* that the call "originated" in the rate center, from CPE consistent with the number "type" and on the network of the company that has the number. *See e.g.* Transcript pp. 238:20-242:23. The problem is that none of these assumptions is necessarily valid. The calling number simply cannot be used as an indicator of what is actually happening today and in particular where the call started, or the network that supported call initiation.

There can be no legitimate dispute that Halo is a wireless carrier and handles traffic by wireless facilities. The testimony and evidence show that Halo communicates with its high volume end user customer over wireless transmitting and receiving facilities in each MTA. *See* Direct Testimony of Russ Wiseman, pp. 6; 22. From a Halo perspective, the high volume customer is simply a "communications intensive business customer" – much like any large enterprise operating a PBX – that is originating traffic from wireless CPE. *See* Direct Testimony of Russ Wiseman, p. 22. The traffic is then

[4] Halo continues to insist that AT&T is using the "end-to-end" doctrine for impermissible purposes. While "end-to-end" is the means to determine "jurisdiction," it cannot be used as the toll to divide between reciprocal compensation and exchange access. The question before December 30, 2011 was whether the traffic was carved out from section 251(b)(5) by section 251(g). It was not. After December 30, 2011, the question is whether the traffic is "Non-Access Reciprocal Compensation" or "Access Reciprocal Compensation." The FCC characterized this very traffic as "transit" and "non-access," so AT&T loses under both regimes and for all relevant time periods. The whole idea of looking through Transcom and establishing both Halo's and Transcom's regulatory classification and intercarrier compensation obligations based on where and how the call started rather than what it is that Halo and Transcom provide to their respective direct customers is flatly inconsistent with federal court precedent and the Act.

delivered to AT&T, exactly as required, and as specified, in the Amendment clauses contained in each and every AT&T ICA. *See* Direct Testimony of Russ Wiseman, p. 6. Halo's high volume end user uses wireless mobile stations within radio coverage of each tower site. *See* Direct Testimony of Russ Wiseman, p. 6. Halo's network is architectured in such a way that the only traffic that will traverse the interconnection arrangements is traffic destined to a terminating carrier in an MTA and processed by the base station in that MTA. *See* Direct Testimony of Russ Wiseman, p. 6.

AT&T has claimed or alleged that the wireless stations used by Halo's high volume customer are either not mobile, or not mobile enough, and therefore the service is not "really" CMRS. Each of the CPE devices used by Halo's high volume customer, Transcom, is "a radio-communication station capable of being moved and which ordinarily does move."[5] *See* Direct Testimony of Russ Wiseman, p. 29. Further, the CPE devices are "capable of operation while in motion." *See* Direct Testimony of Russ Wiseman, p.29; *see, e.g.*,47 C.F.R. § 22 (definition of "mobile station"). The units were designed by the manufacturer to be able to move around while in use, and to "ordinarily" do so. *See* Direct Testimony of Russ Wiseman, p. 29. The power settings in each device have been set to conform to the FCC's "mobile/portable" station" requirements for the 3650 Mhz band contained at 47 C.F.R. §§ 90.1321(c) and 90.1333. Halo's service therefore meets the FCC's standards for CMRS service in 47 CFR 20.9.

AT&T, however, wants to focus on what Transcom does with the mobile service it receives. They contend that merely because the customer does not actually move the stations around, the service is somehow converted from "mobile" to "fixed" or even "not CMRS." This argument inappropriately categorizes Halo's regulatory status based on

[5]*See* § 153(34).

whether the customer engages in AT&T's subjective standard for "sufficient" mobility. The statutory test, however, is the design and capability of the CPE, not the specific manner in which the mobile customer chooses to actually use it.

Halo had intended to offer what some might see as a more traditional "mobile" CPE device than the devices in use today, but its wireless equipment vendor failed to deliver this CPE as promised at the time Halo was turning up its high volume services. *See e.g.* Transcript pp. 294:8-294:18. If the Commission decides that the current wireless stations do not meet the FCC's test for "mobility," and if it finds, contrary to the FCC's precedent, that the equipment fails whatever test the Commission chooses to apply, then Halo could, if necessary, replace the devices presently in use with devices that conform to the Commission's standard. New and even more portable devices have become available since Halo's service launch.

Notably, AT&T has attempted to rely on the FCC's recent *Connect America Order* for the proposition that Halo's traffic must be access traffic because the FCC held that Halo's is not intraMTA. Halo disagrees, and has appealed. Nonetheless, contrary to AT&T's characterizations, the FCC never stated that Halo's service was not "wireless" or "CMRS." The FCC only asserted that it was not intraMTA "for purposes of the intraMTA rule," and made no conclusions about other purposes. The FCC certainly did not hold that end users are not end points and can be intermediate points where no origination occurs.

With regard to compensation, the FCC went a step further and held in ¶ 1006 that traffic like Halo's is "transit," which it defined as "non-access" in ¶ 1311. This distinction is significant because a transit carrier owes no obligation to a terminating

carrier for terminating the traffic. Instead, it is the originating carrier that owes termination. In other words, regardless of whether the traffic is intraMTA, as Halo reasonably believed it to be, or is "transit," as the FCC asserts, Halo does not owe any compensation, and certainly does not owe access compensation for this non-access traffic. Thus, AT&T has not met its burden of proof and is not entitled to the relief it seeks.

Halo maintains that, notwithstanding the FCC Order, Halo is indeed selling CMRS-based telephone exchange service to an ESP end user. All of the communications at issue originate from end user CPE, as defined in the Act, 47 U.S.C. § 153(14),[6] that is located in the same MTA as the terminating location. Therefore, contrary to AT&T's assertions, the traffic in issue *does* "originate[] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T" even though it may not be "intraMTA" under the FCC's rules.

When the customer wants to initiate a session, the customer originates a call using the wireless station that is handled by the base station, processed through Halo's network, and ultimately handed off to AT&T for termination or transit over the interconnection arrangements that are in place as a result of the various ICAs. Even AT&T admitted that CPE – and this CPE in particular – "originates" a communication. *See e.g.* Transcript, p. 277:5-277:20.

AT&T has asserted that Halo is merely "re-originating" traffic and that the "true" end points are elsewhere on the PSTN. In making this argument, however, AT&T is

[6] Stated another way, the mobile stations (*see* 47 U.S.C. § 153(34)) used by Halo's end user customers – including Transcom – are not "telecommunications equipment" as defined in section 153(52) of the Act because the customers are not carriers. Halo has and uses telecommunications equipment, but its customers do not. They have CPE.

advancing the exact position that the D.C. Circuit rejected in *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In that case, the D.C. Circuit held it did not matter that a call received by an ISP is instantaneously followed by the origination of a "further communication" that will then "continue to the ultimate destination" elsewhere.[7] The court held that "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP."[8] In other words, the D.C. Circuit clearly recognizes – and functionally held – that an ESP is an "origination" and "termination" endpoint for intercarrier compensation purposes (as opposed to *jurisdictional* purposes, which does use the "end-to-end" test). Halo has reasonably relied on that holding.

The traffic at issue here goes to Transcom, where there is a "termination." *See* Direct Testimony of Robert Johnson, p. 34; *see also* Rebuttal Testimony of Robert Johnson, p. 9. Transcom then "originates" a "further communication" in the MTA. *See* Direct Testimony of Robert Johnson, p. 34; *see also* Rebuttal Testimony of Robert Johnson, p. 9. In the same way that ISP-bound traffic *from* the PSTN is immune from access charges (because it is not carved out by section 251(g) and is covered by section 251(b)(5)), the call *to* the PSTN is also immune.[9]

AT&T's argument that the traffic is "wireline-originated" misses the point because the question is whether the traffic originates from wireless equipment. AT&T's further claim that Halo owes access charges for the traffic at issue rests on the faulty

[7] *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).
[8] *Id.*
[9] The incumbents incessantly assert that the ESP Exemption only applies "only" for calls "from" an ESP customer "to" the ESP. This is flatly untrue. ESPs "may use incumbent LEC facilities to originate and terminate interstate calls[.]" *See* NPRM, *In the Matter of Access Charge Reform*, 11 FCC Rcd 21354, 21478 (FCC 1996). The FCC itself has consistently recognized that ESPs – as end users – "originate" traffic even when they received the call from some other end-point. That is the purpose of the FCC's finding that ESPs systems operate much like traditional "leaky PBXs."

premise that Transcom is not an end user and that their access tariff applies. *See e.g.* Transcript pp. 99:7-102:7. But, AT&T is barred from asserting that Transcom is not an end user. As previously noted, in the ESP Rulings, on four separate occasions, courts of competent jurisdiction have ruled that Transcom is an ESP *even for phone-to-phone calls*[10] because Transcom changes the content of every call that passes through its system, often changes the form, and also offers enhanced capabilities. *See* Exhibits 1-4 to Direct Testimony of Robert Johnson.

The bankruptcy court directly construed and then decided Transcom's regulatory classification and specifically held that Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the PSTN; and (5) may instead purchase telephone exchange service just like any other end user. *Id.* Three of these decisions were reached after the so-called "IP-in-the-Middle" and "AT&T Calling Card" orders,[11] cited by AT&T in opposition to Halo's position, and expressly took them into account. The courts ruled that Transcom is an end user, not a carrier. *Id.*

Transcom and AT&T were directly involved in the litigation forming the basis of the ESP rulings, and in the ESP Rulings discussed above, the court twice held – over AT&T's strong opposition – that Transcom is an ESP and end user, is not a carrier, and access charges do not apply to Transcom's traffic. This specific set of rulings was

[10] Transcom also has a very significant and growing amount of calls that originate from IP endpoints.

[11] *See* Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (rel. April 21, 2004) ("*AT&T Declaratory Ruling*" also known as "*IP-in-the-Middle*"); Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133, 05-68, FCC 05-41, 20 FCC Rcd 4826 (rel. Feb. 2005) ("*AT&T Calling Card Order*").

incorporated into the Confirmation Order in Transcom's bankruptcy case. AT&T was a party and is bound by these holdings. AT&T is barred from raising any claim that Transcom is anything other than an ESP and end user qualified to purchase telephone exchange service from carriers, and cannot now collaterally attack the bankruptcy court rulings. Transcom's status as an end user is not subject to debate.

Although the Commission has denied Halo's Motion to Dismiss on these grounds, Halo respectfully points out that the Commission's Directive on Halo's Motion to Dismiss fails to analyze the applicability of the doctrines of *res judicata* and collateral estoppel in this instance. Either *res judicata* or collateral estoppel may be applied to preclude the relitigation of the ESP issue in this case.

To establish a *res judicata* defense, a party must establish: "(1) the parties must be identical in both suits, (2) the prior judgment must have been rendered by a court of competent jurisdiction, (3) there must have a final judgment on the merits and (4) the same cause of action must be involved in both cases." *Osherow v. Ernst & Young, LLP (In re Intelogic Trace, Inc.),* 200 F.3d 382, 386 (5th Cir. 2000). The first element, identity of the parties, is satisfied because AT&T was a creditor of Transcom throughout the Bankruptcy Case. It is also not necessary for Transcom to intervene in this proceeding for Halo to assert *res judicata* as a defense. Litigants which are in privy with an earlier litigant, and/or litigants which hold such a 'close and significant relationship' with an earlier litigant (here, Transcom and Halo), sufficiently satisfy the 'identical parties' requirement. *Airframe Systems, Inc. v. Raytheon Co.*, 601 F.3d 9, 14 (1st Cir. 2010). The second element is satisfied since the Bankruptcy Court had jurisdiction over the Plan and Confirmation Order pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (L), and 28 U.S.C.

§§1334(b). The third element is also established because the Confirmation Order is final, and confirmation by the Bankruptcy Court necessitated a finding of Plan feasibility, among other things, and that Transcom provides Enhanced Services. Finally, the fourth element is established because the "critical issue under this determination is whether the two actions are based on the 'same nucleus of operative facts.'" *In re Intelogic*, 200 F.3d at 386. Although the ICA between AT&T and Halo was signed after the Confirmation Order, the current action is undeniably based on the same nucleus of operative facts as the Bankruptcy Case because the primary issue in both proceedings is whether Transcom provides Enhanced Services.

Even assuming that the "identical causes of action" element of *res judicata* is absent, AT&T is nonetheless collaterally estopped from challenging Transcom's status as an ESP. "Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party." *U.S. v.Mendoza*, 464 U.S. 154, 159 n. 4 (1984). Collateral estoppel precludes a party from litigating an issue already raised in an earlier action if:

> (1) the issue at stake is identical to the one involved in the earlier action;
> (2) the issue was actually litigated in the prior action; and
> (3) the determination of the issue in the prior action was a necessary part of the judgment in that action.

Petro-Hunt, L.L.C. v. U.S., 365 F.3d 385, 397 (5th Cir. 2004). One of the issues at stake in this case in order to grant any of the relief requested by AT&T is whether Transcom is an ESP. That issue is identical to the issue decided in the ESP rulings in which AT&T participated and AT&T is estopped from trying to collaterally attack it.

Once it is clear that Transcom is Halo's telephone exchange service end user customer, all of AT&T's contentions simply fail. End users originate calls. End users are end-points, not "intermediate switching points." Because Transcom is an ESP end user that originates traffic from its wireless CPE in the same MTA where Halo delivers the traffic to AT&T, the traffic is intraMTA wireless traffic to which no access charges apply. Accordingly, AT&T has failed to meet its burden of showing that Halo's traffic is anything other than wireless or that it is subject to access charges.

2. <u>AT&T has failed to demonstrate that the traffic at issue is subject to access charges.</u>

Even if AT&T is correct in its arguments that Halo's traffic is not subject to bill and keep, or reciprocal compensation of any kind *that does not mean they are entitled to access payment as a default*. Indeed, even if one wrongly concludes that the traffic could "lawfully" be subjected to the access regime, there is a mandatory next step. AT&T bears the burden of proving that the *actual terms* of the terms and conditions in their access tariffs can be read to apply. Halo does not have any burden to disprove that any tariffs do actually apply. The law is clear that AT&T carries the burden of showing how any of its tariffs apply and then demonstrating precisely what service is being provided.

"To recover for amounts charged pursuant to their tariffs, 'plaintiffs must demonstrate (1) that they operated under a federally filed tariff and (2) that they provided services to the customer pursuant to that tariff." *Alliance Communs. Coop., Inc. v. Global Crossing Telcoms., Inc*., 663 F. Supp. 2d 807, 819 (D.S.D. 2009); *Advamtel LLC v. AT & T Corp*., 118 F. Supp. 2d 680, 683 (E.D. Va. 2000); *Frontier Communications of Mt. Pulaski, Inc. v. AT&T Corp.*, 957 F. Supp. 170, 175-76 (C.D. Ill. 1997). In order to

determine whether AT&T in this case provided "access" service pursuant to its tariffs one must necessarily review the tariff itself. *See id.*

AT&T has failed, however, to compare the definitional and technical specifications in the tariffs to the specific arrangements in issue and then to show how they matched. AT&T has failed to explain how the words in their tariffs capture the traffic in a way that make Halo an access customer. No witness of AT&T did anything more than assert – without any real support – that "access applies." There is no evidence that Halo is actually receiving "access service," as defined in AT&T's tariffs. All AT&T has proffered is the unsupported conclusion that "access applies".

Counsel for Halo attempted to elicit from AT&T's witnesses their thoughts on precisely what "access service" AT&T is providing to Halo to get them to explain their position. *See e.g.* Transcript pp. 125:25-128:16. Mr. McPhee did not definitively assert specifically what switched access Feature Group is being provided, although Mr. McPhee agreed that it must be one of the four exclusive types set out in the tariff. *Id.*

It may or may not be that the arrangement is "most like" Feature Group D, but the evidence elicited during the hearing made clear that AT&T is ***not*** saying it ***is*** Feature Group D. Thus, as a matter of law, Halo cannot be said to actually be receiving Feature Group D – or any other switched access feature group – from AT&T. Regardless, the foregoing clearly demonstrates that AT&T has completely failed to carry its burden of proof on whether the traffic at issue is indeed part of any tariffed access service. If the tariff does not apply – and it does not – then the tariffed rates obviously cannot be imposed. That would be a violation of the filed rate doctrine.

3. Halo's signaling practices are consistent with industry practice and Halo does not disguise the origin and type of traffic in any way.

AT&T has also failed to meet its burden of proving that Halo altered or disguised Calling Party or Called Party information or otherwise did anything improper with regard to SS7 signaling. These are the common ways to manipulate call records to deceive carriers, because these are the data points that LECs want to use to determine jurisdiction for rating purposes. However, Halo's practice, which is at issue, involves merely inserting a Charge Number ("CN") to designate the responsible billing party and is consistent with industry practice. *See* Direct Testimony of Russ Wiseman, pp. 31-33. The insertion of CN did not disguise, and does not disguise, the traffic in any way. *Id*. The insertion of CN did not trick AT&T's system into thinking a call was local, if for no other reason than AT&T does not do "call by call" rating, as Mr. Neinast himself acknowledges, and as Halo understood before traffic ever started to flow. AT&T relies on traffic factors to assess termination charges. *See* Rebuttal Testimony of Mark Neinast, p. 27.

Inserting a CN, or removing it, whether that number is a wireless number, or a wireline number, has zero effect on call charges. So, in short, inserting CN was not an attempt to disguise traffic, it does not make traffic "appear" local, nor does it make it "appear" wireless. If these were Halo's goals, why would Halo implement a tactic that could not work, and would not withstand even basic scrutiny upon examination? And, if insertion of CN was meant to deceive AT&T or any other ILEC, why would Halo initiate a traffic study to eliminate the InterMTA traffic factors knowing full well that AT&T would examine call records as part of this process and "discover" the "deception"? The insertion of the CN was done, again consistent with industry practice, so Halo could

correctly bill services, and associate its customer calls to terminating LECs, where different terminating charges are in effect. *See* Direct Testimony of Russ Wiseman, pp. 31-33.

Halo populates the address signal information that belongs in the CPN unchanged. Halo does not remove, alter or manipulate this information in any way. *See* Direct Testimony of Russ Wiseman, pp. 31-33. Halo does not change the content or in any way "manipulate" the address signal information that is ultimately populated in the SS7 ISUP IAM Called Party Number ("CPN") parameter. The argument that Halo alters or deletes call detail also fails once it is understood that this is end user telephone exchange service originating traffic, and the service being provided is functionally equivalent to an integrated services digital network ("ISDN") primary rate interface ("PRI") (hereinafter referred to as "ISDN PRI") trunk to a large communications intensive business customer. Indeed, Halo's signaling practices with regard to CN are exactly the same as those AT&T uses when it provides ISDN PRI trunk service to a business customer. *Id*. Halo is exactly following industry practice applicable to an exchange carrier providing telephone exchange service to an end user, and in particular a communications-intensive business end user with sophisticated CPE. *Id*.

Halo performs the "Class 5" functions and populates the CPN and CN parameters with the address signal information that should appear in each location. *See* Direct Testimony of Russ Wiseman, pp. 33-37. And again, Halo's practices with regard to the CN are exactly the same as AT&T's when it serves a business end user with an ISDN PBX. *Id*.

Halo's network is IP-based, and the network communicates internally and with customers using a combination of WiMAX and Session Initiated Protocol ("SIP"). *See* Direct Testimony of Russ Wiseman, pp. 33-37. To interoperate with the SS7 world, Halo must conduct a protocol conversion from IP to SS7 and then transmit call control information using SS7 methods. *Id*. AT&T's allegations fail to appreciate this fact, and are otherwise technically incoherent. AT&T's position on this issue reflects a distinct misunderstanding of technology, SS7, the current market, and most important, a purposeful refusal to consider this issue through the lens of CMRS telephone exchange service provided to an end user.

From a technical perspective, "industry standard" in the United States is American National Standards Institute ("ANSI") T1.113, which sets out the semantics and syntax for SS7-based CPN and CN parameters. *See* Direct Testimony of Russ Wiseman, pp. 33-37. The "global" standard is contained in ITU-T series Q.760-Q.769. ANSI T1.113 describes the CPN and CN parameters:

> Calling Party Number. Information sent in the forward direction to identify the calling party and consisting of the odd/even indicator, nature of address indicator, numbering plan indicator, address presentation restriction indicator, screening indicator, and address signals.
>
> Charge Number. Information sent in either direction indicating the chargeable number for the call and consisting of the odd/even indicator, nature of address indicator, numbering plan indicator, and address signals.

Id. The various indicators and the address signals have one or more character positions within the parameter and the standards prescribe specific syntax and semantics guidelines. *Id*. The situation is essentially the same for both parameters, although CN can be passed in either direction, whereas CPN is passed only in the forward direction. *Id*. The CPN and CN parameters were created to serve discrete purposes and they convey different meanings consistent with the design purpose. *Id.* For example, CPN was

created largely to make "Caller ID" and other CLASS-based services work. Automatic Number Identification ("ANI") and CN, on the other hand, are pertinent to billing and routing. *Id*.

a. SS7 ISUP IAM Calling Party Number Parameter Content.

Halo's signaling practices on the SS7 network comply with the ANSI standard with regard to the address signal content. *See* Direct Testimony of Russ Wiseman, pp. 33-37. Halo's practices are also consistent with the Internet Engineering Task Force ("IETF") "standards" for SIP and SIP to ISDN" User Part ("ISUP") mapping. *Id*. Halo populates the SS7 ISUP IAM CPN parameter with the address signal information that Halo has received from its high volume customer (Transcom). *Id*. Specifically, Halo's practices are consistent with the IETF Request for Comments ("RFCs") relating to mapping of SIP headers to ISUP parameters. *See, e.g.*, G. Camarillo, A. B. Roach, J. Peterson, L. Ong, RFC 3398, *Integrated Services Digital Network (ISDN) User Part (ISUP) to Session Initiation Protocol (SIP) Mapping*, © The Internet Society (2002), available at http://tools.ietf.org/html/rfc3398.

> When a SIP INVITE arrives at a PSTN gateway, the gateway SHOULD attempt to make use of encapsulated ISUP (see [3]), if any, within the INVITE to assist in the formulation of outbound PSTN signaling, but SHOULD also heed the security considerations in Section 15. If possible, the gateway SHOULD reuse the values of each of the ISUP parameters of the encapsulated IAM as it formulates an IAM that it will send across its PSTN interface. In some cases, the gateway will be unable to make use of that ISUP - for example, if the gateway cannot understand the ISUP variant and must therefore ignore the encapsulated body. Even when there is comprehensible encapsulated ISUP, the relevant values of SIP header fields MUST 'overwrite' through the process of translation the parameter values that would have been set based on encapsulated ISUP. In other words, the updates to the critical session context parameters that are created in the SIP network take precedence, in ISUP-SIP-ISUP bridging cases, over the encapsulated ISUP. This allows many basic services,

> including various sorts of call forwarding and redirection, to be implemented in the SIP network.
>
> For example, if an INVITE arrives at a gateway with an encapsulated IAM with a CPN field indicating the telephone number +12025332699, but the Request-URI of the INVITE indicates 'tel:+15105550110', the gateway MUST use the telephone number in the Request-URI, rather than the one in the encapsulated IAM, when creating the IAM that the gateway will send to the PSTN. Further details of how SIP header fields are translated into ISUP parameters follow.

See Direct Testimony of Russ Wiseman, pp. 33-37.

b. SS7 ISUP IAM Charge Number Parameter Content.

Halo's high volume customer will sometimes pass information that belongs in the CPN parameter that does not correctly convey that the Halo end user customer is originating a call in the MTA. *See* Direct Testimony of Russ Wiseman, pp. 33-37. When this is the case, Halo still populates the CPN, including the address signal field with the original information supplied by the end user customer. *Id*. Halo, however, also populates the CN parameter. *Id*. The number appearing in the CN address signal field will usually be one assigned to Halo's customer and is the billing account number, or its equivalent, for the service provided in the MTA where the call is processed. *Id*. In ANSI terms, that is the "chargeable number." *Id.*

This practice is also consistent with the developing IETF consensus and practices and capabilities that have been independently implemented by many equipment vendors in advance of actual IETF "standards." *See* Direct Testimony of Russ Wiseman, pp. 33-37. SIP "standards" do not actually contain a formal header for "Charge Number." *See* D. York and T. Asveren, SIPPING Internet-Draft, *P-Charge-Info - A Private Header (P-Header) Extension to the Session Initiation Protocol (SIP)* (draft-york-sipping-p-charge-info-01) © The IETF Trust (2008), available at http://tools.ietf.org/html/draft-york-

sipping-p-charge-info-01 (describing "'P-Charge-Info', a private SIP header (P-header) used by a number of equipment vendors and carriers to convey simple billing information."). Vendors and providers began to include an "unregistered" "private" header around 2005. *Id.* The IETF has been working on a "registered" header for this information since 2008. *Id*. The most recent draft was released in September, 2011. *See* D. York, T. Asveren, SIPPING Internet-Draft, *P-Charge-Info - A Private Header (P-Header) Extension to the Session Initiation Protocol (SIP)* (draft-york-sipping-p-charge-info-12), © 2011 IETF Trust, available at http://www.ietf.org/id/draft-york-sipping-p-charge-info-12.txt. Halo's practices related to populating the Halo-supplied billing telephone number for Transcom in the SS7 ISUP IAM CN parameter are quite consistent with the purposes for and results intended by each of the "Use Cases" described in the most recent document.

Halo notes that, with regard to its consumer product, Halo will signal the Halo number that has been assigned to the end user customer's wireless CPE in the CPN parameter. *See* Direct Testimony of Russ Wiseman, pp. 33-37. There is no need to populate the CN parameter, unless and to the extent the Halo end user has turned on call forwarding functionality. *Id*. In that situation, the Halo end user's number will appear in the CN parameter and the E.164 address of the party that called the Halo customer and whose call has been forwarded to a different end-point will appear in the CPN parameter. *Id*. Once again, this is perfectly consistent with both ANSI and IETF practices for SIP and SS7 call control signaling and mapping.

The testimony and evidence demonstrate that Halo does not take any action to "disguise" anything with regard to signaling. Instead, Halo is exactly following industry

practice applicable to an exchange carrier providing telephone exchange service to an end user, and in particular, a communications-intensive business end user with sophisticated CPE. Accordingly, AT&T has failed to meet its burden of proof on this issue.

It is also worth noting that, as of December 29, 2011, Halo ceased inserting the CN. *See* Direct Testimony of Russ Wiseman, pp. 37-38. Halo ceased this practice in order to preclude any possible argument it was not complying with the new FCC Order. *Id.* And, based on the change of law provision in the ICA, Halo stands ready to renegotiate terms so that it is in compliance with an agreement that both parties can accept. Rather than ending Halo's business in South Carolina, the Commission should consider the utility of the change of law provision in the ICA. Halo should be given the opportunity to utilize the change of law provision to renegotiate the terms of the ICA that are affected by the new FCC Order.

4. Halo has paid all facilities charges due under the ICA and the additional charges demanded by AT&T are not permitted under the ICA.

AT&T has failed to prove its entitlement to any "facilities" charges beyond what Halo has already paid under the ICA. AT&T is seeking to charge Halo for cross-connects, multiplexing and trunk ports entirely within the AT&T building and on AT&T's side of the POI. *See* Direct Testimony of Russ Wiseman, pp. 57-67. A plain reading of Section V.B of the ICA makes clear that the facilities charges AT&T seek are due only when Halo "purchases" the "trunk group" via "this Agreement" or from the "General Subscriber Services Tariff." Halo never "purchased" the "trunk group(s)" from the "General Subscriber Services Tariff. *Id*. Halo never "purchased" the trunk groups from AT&T under the ICA. *Id*.

The testimony of AT&T's witnesses makes unclear whether its demand for the facilities charges at issue comes from its Special Access Tariff or its General Subscriber Services Tariff, Section A35. *See e.g.* Transcript pp. 147:14-152:1. In any event, Halo is not ordering facilities from either of AT&T's tariffs. *See* Direct Testimony of Russ Wiseman, pp. 57-67. If Halo was, in fact, leasing transport facilities from AT&T to get from the Halo network to the POI this might make some sense. However, as Russ Wiseman testified, Halo chose to use a third party transport provider, not AT&T, to provide those facilities. *Id*. This is consistent with paragraph IV.B of the ICA, which sets out the options for interconnection:

> B. There are three methods of interconnecting facilities: (1) interconnection via facilities owned, provisioned and/or provided by either party to the other party [note 1]; (2) physical collocation; and (3) virtual collocation where physical collocation is not practical for technical reasons or because of space limitations. Type 1, Type 2A and Type 2B interconnection arrangements described in BellSouth's General Subscriber Services Tariff, Section A35, or, in the case of North Carolina, in the North Carolina Connection and Traffic Interchange Agreement effective June 30, 1994, as amended, may be purchased pursuant to this Agreement provided, however, that such interconnection arrangements shall be provided at the rates, terms and conditions set forth in this Agreement. Rates and charges for both virtual and physical collocation may be provided in a separate collocation agreement. Rates for virtual collocation will be based on BellSouth's Interstate Access Services Tariff, FCC #1, Section 20 and/or BellSouth's Intrastate Access Services Tariff, Section E20. Rates for physical collocation will be negotiated on an individual case basis.
>
> [note 1] On some occasions Carrier may choose to purchase facilities from a third party. In all such cases carrier agrees to give BellSouth 45 (forty five) days notice prior to purchase of the facilities, in order to permit BellSouth the option of providing one-way trunking, if, in its sole discretion BellSouth believes one-way trunking to be a preferable option to third party provided facilities. Such notice shall be sent pursuant to Section XXIX. In no event shall BellSouth assess additional interconnection costs or per-port charges to Carrier or its third-party provider should Carrier purchase facilities from a third party, e.g. the same charges that BellSouth would charge Carrier should it provide the service.

ICA, ¶ IV.B.

Consistent with this paragraph in the ICA, Halo has used a third party provider for transport from the Halo network to the POI at the AT&T tandem buildings. *See* Direct Testimony of Russ Wiseman, pp. 57-67. AT&T could have chosen to then extend one-way trunks, but it did not. Regardless, the ICA expressly says that when third party facilities are used "*[i]n no event* shall BellSouth assess additional *interconnection costs or per-port charges* to Carrier or its third-party provider *should Carrier purchase facilities from a third party*, e.g. the same charges that BellSouth would charge Carrier should it provide the service." (emphasis added). *Id*. This important provision expressly bans the very charges in issue because AT&T is nonetheless trying to recover "additional interconnection costs or per-port charges …, e.g. the same charges that BellSouth would charge" Halo if AT&T was providing "the service." AT&T's charges are therefore banned by the express terms of the ICA and should be denied.

Based on the foregoing, Halo is simply not responsible for AT&T's additional "facilities" billings because they are not consistent with what the ICA requires. Accordingly, AT&T's demand for these additional facilities charges should be denied.

III. CONCLUSION

The testimony and evidence in this case establish that the traffic at issue originated over wireless facilities, as required by the ICA between Halo and AT&T, and was signaled properly, consistent with industry standards. The traffic at issue is not subject to access charges and AT&T has not met its burden of proving otherwise. Halo has paid all charges that are due and Halo is not in breach of the ICA. In short, AT&T has failed to meet its burden of proof for establishing any right or grounds for the relief

requested in their respective petitions. Accordingly, all of the relief requested by AT&T must be denied.

Respectfully submitted,

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BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2011-304-C

IN RE:

Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T southeast d/b/a AT&T South Carolina v. Halo Wireless, Incorporated for Breach of the Parties' Interconnection Agreement	))))))	**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day, one (1) copy of the Post-Hearing Brief of Halo Wireless, Inc. as follows:

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